



**SO ORDERED.**

**SIGNED this 23 day of November, 2004.**

*Dale L. Somers*

Dale L. Somers  
UNITED STATES BANKRUPTCY JUDGE

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**WOLFGANG LEE WILLIS,**

**DEBTOR.**

**CASE NO. 02-22721-7  
CHAPTER 7**

**MEMORANDUM OF DECISION**

This matter is before the Court on the United States Trustee's motion to dismiss the case under 11 U.S.C.A. § 707(b) because granting the debtor relief would be a substantial abuse of Chapter 7 of the Bankruptcy Code. United States Trustee Mary E. May appears by counsel Richard A. Wieland. Debtor Wolfgang Lee Willis appears by counsel Christopher T. Fletcher. The Court has reviewed the relevant materials and is now ready to rule.

The parties have submitted this matter to the Court for decision based on stipulated facts. To gain a fuller understanding of the facts, the Court has also taken judicial notice of the contents of the Schedules the Debtor signed under penalty of perjury and filed along with his Chapter 7 bankruptcy petition.<sup>1</sup> After considering the totality of the circumstances of this case, the Court concludes that allowing the Debtor to obtain a discharge of his debts in Chapter 7 would constitute a substantial abuse of the provisions of that chapter, so his case must be dismissed.

## **FACTS**

The Debtor filed a Chapter 7 bankruptcy petition on August 1, 2002. After the meeting of creditors was held, the U.S. Trustee filed a timely motion to dismiss the case as a substantial abuse of Chapter 7. At a pretrial conference in March 2003, the parties indicated they would submit a pretrial order and then file summary judgment motions. The pretrial order was submitted, and the Court signed and filed it in June 2003. That order included various stipulations, but neither party filed a summary judgment motion. The judge who had been presiding over the case later retired, and it was reassigned. At a hearing in March 2004, the parties agreed to submit the matter for decision based on stipulated facts. The stipulated facts they filed a short time later were practically identical to those contained in the earlier pretrial order.

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<sup>1</sup>See Fed. R. Evidence 201(b), (c), & (f); *see also In re Applin*, 108 B.R. 253, 257-58 (Bankr. E.D. Cal. 1989) (judicial notice of basic filings in bankruptcy case is permissible to fill gaps in evidentiary record of specific adversary proceeding or contested matter).

The Debtor admits that the debts he reported on the Schedules he filed with his Chapter 7 petition are primarily consumer debts, thus conceding that one of the requirements for dismissal under § 707(b) is met. He listed two secured debts in his Schedules, both involving liens on automobiles. But he also noted that one of the cars was in his ex-wife's possession, presumably having been awarded to her in their divorce. So far as the Debtor's interest is concerned, then, the \$18,896.29 debt secured by that car is effectively unsecured. He reported the amount owed on his own car was \$6,000. The Debtor listed \$21,395.41 in liquidated unsecured debts; all but about \$80 of these debts were incurred through credit card charges and a personal loan. He also listed the amounts of two debts as unknown. Both of these had been secured debts but the vehicles securing them had been repossessed, and so far as he knew, the Debtor might owe deficiencies on them. He reported that the vehicles had been worth \$8,000 and \$5,000 when they were repossessed.

On Schedule I, the Debtor reported that he was divorced, had one nine-year-old dependent, and had net monthly income of \$2,816.95. The Court notes that he reported \$141.01 per month in child support on this Schedule as a deduction from his gross pay. The Debtor had been in the same job for six years when he filed his bankruptcy petition, and his annual income was between \$45,000 and \$50,000 in 2000 and 2001. His income for the first seven months of 2002 was averaging about \$1,000 less per month than his 2001 monthly average, but he has not suggested this decrease caused him to file for

bankruptcy, or even that he expected his 2002 income to be less than his 2001 income had been. Perhaps he has received substantial bonuses in the second half of the year in the past and expected to again in 2002. In any event, absent some assertion by the Debtor that his income has in fact decreased, the Court must assume he expects his income to remain stable.

On Schedule J, the Debtor reported the following expenses:

Rent .....	\$ 600.00
Utilities:	
Electricity and heating fuel .....	\$ 140.00
Water and sewer .....	\$ 30.00
Telephone .....	\$ 35.00
Home maintenance (repairs and upkeep) .....	\$ 30.00
Food .....	\$ 230.00
Clothing .....	\$ 100.00
Laundry and dry cleaning .....	\$ 40.00
Medical and dental expenses .....	\$ 100.00
Transportation (not including car payments) .....	\$ 140.00
Recreation, clubs and entertainment, newspapers, magazines, etc. ....	\$ 40.00
Insurance (not deducted from wages or included in home mortgage payments)	
Health .....	\$ 74.00
Auto .....	\$ 100.00
Taxes (not deducted from wages or included in home mortgage payments)	
(Specify) <u>Personal Property Tax</u> .....	\$ 25.00
Installment payments: (In chapter 12 and 13 cases, do not list payments to be included in the plan)	
Auto .....	\$ 285.00
Other <u>Auto Loan</u> .....	\$ 435.00
Other <u>Auto Loan</u> .....	\$ 144.00
Other <u>Personal Loan</u> .....	\$ 190.00
Other <u>Grooming and Cigarettes</u> .....	\$ 140.00
TOTAL MONTHLY EXPENSES .....	<u>\$ 2,878.00</u>

None of these expenses appear to be unusually small. The Debtor reported no expenses for renter's or life insurance, or for charitable contributions, but many people choose not to spend their money on such items. Nothing else about the Debtor's budget suggests that his expenses might have been understated. So Schedules I and J indicated the Debtor had a monthly budget deficit of \$61.05.

In the motion to dismiss filed in October 2002, the U.S. Trustee indicated concern about the three car payments the Debtor had listed among his expenses. Although this was not made explicit in the motion, presumably the U.S. Trustee meant to suggest that a single person with a nine-year-old child should need only one car, so the Debtor could easily reduce his expenses by giving up two of the car payments. In fact, at least by June 2003, the Debtor stipulated that he was making payments on only one of the three auto loans he had listed, the one for \$285, so his monthly expenses were reduced by \$579, the sum of the other two. In addition, the U.S. Trustee expressed concern about the personal loan. Nothing in the file indicates the Debtor has made any effort to reaffirm his obligation on the unsecured personal loan on which he reported he was making monthly payments of \$190. There is seldom any good reason for a debtor to reaffirm such a debt. If he were allowed to obtain a Chapter 7 discharge, then, the Debtor would no longer be obliged to make that payment, reducing his expenses by another \$190. When the extra car payments and the personal loan payment are eliminated, the Debtor's budget shows a surplus of \$707.95, rather than a deficit.

If the Debtor were to devote \$650 of this surplus to a Chapter 13 plan for the minimum permitted term, 36 months, he could pay \$23,400 toward his debts. Because the Debtor stopped paying the car loans other than the one on his own car and nothing in the file indicates that his ex-wife or the creditor secured by the car in her possession has complained about his failure to make payments on that car loan, the Court assumes the

Debtor would have no need to treat his ex-wife or that creditor as a secured creditor under a Chapter 13 plan. The trustee's fee is currently 8%, which would consume \$1,872 of the Debtor's payments of \$23,400. The Debtor reported that he owed \$6,000 on his car, and he would undoubtedly choose to repay that debt in any plan he might propose. This would leave \$15,528 to be distributed to his unsecured creditors, enough to pay about 72.5% of the total owed on the unsecured claims for which he reported an amount due. Even if he somehow could be required to add the full amount of the debt secured by his ex-wife's car to the other unsecured debts to receive distributions under his plan, the hypothetical \$650 per month would pay about 38.5% of those debts in three years.

Without authentication or explanation, the parties attached to their stipulation a copy of a letter that the Debtor's attorney apparently sent to the U.S. Trustee three weeks before the Trustee filed her motion to dismiss. The main thrust of the letter seems to be an effort to explain why the Debtor included the three car loans in the monthly expenses he reported in his Schedules. In essence, it says that before he filed his bankruptcy petition, the Debtor allowed a creditor to repossess more than one vehicle (the letter refers to them in the plural but does not otherwise indicate how many were involved), but left the monthly payments for those vehicles in his reported expenses because he thought he should until he heard from the creditor about the sale of the vehicles. The letter appears to be referring to the two repossessed vehicles the Debtor had reported in his Schedules.

In short, the Debtor has stipulated that he had over \$700 per month more in net income than expenses, apparently even as of the day he filed for bankruptcy. The Debtor never filed a response to the Trustee's motion to dismiss. The only defense the Debtor stated in the pretrial order is nothing more than the bare assertion that, under the totality of the circumstances, his filing did not constitute a substantial abuse of the provisions of Chapter 7. He has not suggested that his bankruptcy filing was precipitated by any emergency, such as unemployment or a sudden illness. He has submitted nothing to explain why he did not file a Chapter 13 reorganization instead of a Chapter 7 liquidation.

## **DISCUSSION**

The U.S. Trustee asks for dismissal of this case pursuant to § 707(b), which authorizes the Court to dismiss a Chapter 7 bankruptcy case “if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter.”<sup>2</sup> However, the Court must keep in mind that “[t]here shall be a presumption in favor of granting the relief requested by the debtor.”<sup>3</sup> Congress provided no definition of “substantial abuse,” but the Tenth Circuit addressed its meaning a few years ago in *In re Stewart*.<sup>4</sup> The Circuit reviewed decisions by other circuit courts, and ultimately said:

After careful consideration, we adopt the “totality of the circumstances” standard. While we agree ability to pay is a primary factor in determining whether “substantial abuse” occurred, we believe other relevant or contributing factors,

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<sup>2</sup>11 U.S.C.A. § 707(b).

<sup>3</sup>*Id.*

<sup>4</sup>175 F.3d 796 (10th Cir. 1999).

such as unique hardships, must also be examined before dismissing a Chapter 7 petition. Conversely, where an inability to pay exists, we believe other factors may nevertheless establish substantial abuse. We recognize the factors articulated by other courts as instructive, but conclude they are not inclusive of all factors considered. A substantial-abuse analysis must be made on a case-by-case basis.<sup>5</sup>

The Circuit also referred to a variety of factors identified by other courts that can affect the substantial abuse analysis, indicating that they could be helpful, though not exclusive or determinative. In addition to ability to pay, these include: (1) sudden illness, calamity, disability, or unemployment; (2) cash advances and consumer purchases far in excess of ability to pay; (3) excessive or unreasonable family budget; (4) accurate reflection of financial condition in the debtor's Schedules; (5) the debtor's good faith; (6) the stability of the debtor's income; (7) the debtor's eligibility for Chapter 13 relief; (8) the availability of state remedies to ease the debtor's financial predicament; (9) the degree of relief the debtor could obtain through private negotiation; and (10) the possibility of significantly reducing the debtor's expenses without depriving him or her of necessities such as adequate food, clothing, and shelter.<sup>6</sup>

The Debtor's employment and income appear to be stable and, with the elimination of the extra car payments and the personal loan payment, expense reductions that would not deprive him of any necessities, his income is clearly sufficient to pay his living expenses as well as a substantial portion of his unsecured prepetition debts over the

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<sup>5</sup>*Id.* at 809.

<sup>6</sup>*Id.* at 809.

minimum three-year term of a Chapter 13 plan. The Debtor has not suggested that any kind of emergency forced him to file for bankruptcy. He appears to satisfy the eligibility requirements for Chapter 13 because he lives in the United States, his income is regular, his reported debts are well within the Chapter 13 debt limits, and there is no indication that a prior bankruptcy filing made him ineligible at the time he filed his bankruptcy petition.<sup>7</sup> The Debtor has not argued that any specific facet of his circumstances might be construed to suggest that granting him a discharge would not be a substantial abuse of the provisions of Chapter 7, and the Court is not willing to construct an argument for him.

## **CONCLUSION**

After carefully considering all the circumstances that have been presented, the Court is forced to conclude that granting relief in this case would be a substantial abuse of Chapter 7, so the case must be dismissed as required by § 707(b).

The foregoing constitutes Findings of Fact and Conclusions of Law under Rules 7052 and 9014(c) of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

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<sup>7</sup>See 11 U.S.C.A. § 109(a), (e), & (g).

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of the above MEMORANDUM OF DECISION were mailed via regular U.S. mail, postage prepaid, on the \_\_\_\_\_ day of November, 2004 to the following:

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/s/ Vicki Jacobsen

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